ATTACHMENT B

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October 11, 1996

RECEIVED
OCT 1 1 1996
Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition of City of Abilene, Texas, for Expedited Declaratory Ruling
CCBPol 96-19

Dear Secretary Caton:

Please accept for filing the enclosed original and six copies of the American Public Power Association's comments in support of the petition identified above. Kindly also date-stamp the additional copy and return it to the messenger.

We are also sending two copies to Janice Myles, Federal Communications Commission, Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554, and one copy to the International Transcription Service.

Sincerely,

Jim Baller

James Baller

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Petition of Abilene, Texas	)	CCBPol 96-19
For Expedited Declaratory Ruling	)	
	)	

To the Commission:

COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION IN SUPPORT OF THE PETITION OF ABILENE, TEXAS FOR EXPEDITED DECLARATORY RULING

In its petition for expedited declaratory ruling, the City of Abilene, Texas, has asked the Commission to declare that section 3.251(d) of the Texas Public Utility Regulatory Act of 1995 ("PURA 1995") violates section 253 of the Telecommunications Act of 1996. The American Public Power Association ("APPA"), the national service representative of the Nation's 2000 publicly-owned electric utilities, supports the petition and urges the Commission to grant it expeditiously, in clear and unmistakable terms.

This proceeding presents the same legal issue that the Commission is now considering in Docket Number CCBPol 96-14, involving IntelCom Group (U.S.A.), ICG Telecom Group, Inc. and the City of San Antonio's publicly-owned electric utility ("the ICG Proceeding"). Although the facts appear to differ slightly, both cases turn on whether section 253 of the 1996 Act invalidates PURA 95's provision that prohibits Texas municipalities and their municipally-owned utilities from participating directly or indirectly in the provision of telecommunications services. APPA addressed the relevant considerations at length in its opening and reply comments in the ICG proceeding, and it adopts and incorporates those comments here. For the convenience of the Commission, APPA appends copies of these comments as Attachment A.

In addition, in the period since APPA filed its comments in the ICG proceeding, the Commission has issued its first preemption decision under section 253 of the Act, *Classic Telephone, Inc.*, CCBPol 96-10 (October 1, 1996). In that case the Commission made clear that it will enforce its preemption authority vigorously and proactively, even where state or local barriers to entry are based upon statutes and regulations that are facially neutral and do not themselves explicitly impose such barriers. *Id.* at ¶ 50. The prohibitions in PURA 95 are both explicit and contrary to the principle of competitive neutrality, as they single out municipalities and municipally-owned utilities for special adverse treatment.

APPA urges the Commission not only to preempt section 3.251(d) of PURA 95, but to do so in a way that will discourge the erection or application of similar unlawful barriers in other cases. APPA submits that prompt and decisive decisions in this case and in the ICG proceeding will significantly accelerate our Nation's fulfillment of the pro-competitive goals reflected in section 253.

Respectfully submitted,

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Attorneys for the
American Public Power Association

October 11, 1996

ATTACHMENT A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Petitions for Preemption of Local	)	CCBPol 96-14
Barriers Pursuant to Section 253 of	)	
the Telecommunications Act of 1996	)	

To the Commission:

COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association ("APPA") supports the petition for preemption that IntelCom Group (U.S.A.) and ICG Telecom Group, Inc. (collectively "ICG") have filed in this proceeding and strongly endorses ICG's conclusion that Section 253 of the federal Telecommunications Act of 1996 requires the Commission to preempt Section 3.251(d) of the Texas Public Utilities Regulatory Act of 1995 ("PURA95"). As the attorney general of Texas has applied Section 3.251(d) in the context of ICG's licensing agreement with the San Antonio City Public Service Board ("SAPSB"), that provision cannot be reconciled with the language and legislative history of the federal Act. APPA also urges the Commission to use this opportunity to send a prompt, clear and unmistakable message to all concerned across the Nation that the Commission will act vigorously to eliminate state and local barriers to competition in the telecommunications arena.

Interest of APPA

APPA is the national service organization for approximately 2000 consumer-owned electric utilities throughout the Nation, located in every state except Hawaii. Three-quarters of these utilities are located in towns with populations of less than 10,000, but some of the Nation's largest cities also operate their own electric power systems, including Los Angeles, Sacramento, Phoenix, Seattle, Notably, neither the text of PURA95 nor its legislative history suggests that the Texas legislature considered barring municipalities and municipal electric systems from furnishing or facilitating the provision of telecommunications services to be necessary to preserve and advance universal service, to protect the public safety and welfare, to ensure the continued quality of telecommunications services or to safeguard the rights of consumers.

3. The Texas Attorney General's Opinion

On May 13, 1996, responding to a letter from Senator Sibley, the Texas attorney general issued an opinion letter that applied Section 3.251 to the ICG license agreement. After reviewing the various operating arrangements between SAPSB and ICG, the attorney general concluded that the agreement

> . . . constitutes a degree of participation by the city in the provision of telecommunications services, and thus involves a "sale to the public . . . indirectly through a telecommunications provider, as service for which a certificate is required." Specifically, the following provisions of the agreement, taken together, bring it within the prohibition of subsection (d) of section 3.251: the sharing of costs of construction; the joint operation of the network; the sharing of revenues derived from the provision of services and the lease of excess capacity to third parties; the award of a "marketing fee" to ICG from gross revenues received by the city regardless of ICG's degree of participation in the marketing of services; the sharing of the costs of legal expenses necessary to defend the agreement; and ICG's payment of five percent of its gross revenues to the city in lieu of franchise fees.

Attachment 3 to ICG's Petition at 2144-45.

The attorney general's opinion said nothing about preserving or advancing universal service, protecting the public safety and welfare, ensuring the continued quality of telecommunications services or safeguarding the rights of consumers.

4. The Telecommunications Act of 1996

The federal Telecommunication Act of 1996 contains two provisions that bear heavily on this proceeding -- Section 253, which addresses the Commission's authority to preempt state and local barriers to entry, and Section 3(51), which defines the "telecommunications service" to which Section 253 applies.

In its entirety, and with emphasis added, Section 253 reads as follows:

> (a) IN GENERAL- No State or local statute or regulation, or other State or local legal requirement, *may prohibit or have the effect of prohibiting* the ability of *any entity* to provide any interstate or intrastate *telecommunications service*.
>
> (b) STATE REGULATORY AUTHORITY- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) PREEMPTION- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), *the Commission shall preempt* the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

As the emphasized language indicates, Section 253 has four main features: (1) it does not apply only to *explicit* barriers to entry but also to *implicit* requirements that may merely "have the effect" of precluding competition in telecommunications; (2) it affords protection to "any entity" that may be adversely affected by such barriers; (3) it focuses upon "telecommunications service," a term of art under the Act; and (4) it *requires* the Commission to preempt any state or local requirement to the extent necessary to eliminate its anti-competitive effects.

Section 3(51) of the Act, in turn, defines the "telecommunications service" covered by Section 253 as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." The key operative terms are "for a fee" and "directly to the public" -- limitations that Congress included in the Act at the express urging of APPA, UTC, The Telecommunications Association and other representatives of public utilities. By embracing these terms, Congress expressed its intent to exclude at least the following categories of services from the Act; a utility's own internal usage of its telecommunications facilities; a utility's provision of telecommunications support to other instrumentalities of government; a utility's sales to a restricted class of end users pursuant to contracts for private carriage (as distinguished from common carriage);[1] and a utility's provision of telecommunications infrastructure -- such as dark fiber or wholesale capacity -- to persons who are themselves in the business of furnishing telecommunications services for a fee directly to the public.[2] The Act's alternative definition of "telecommunications service" -- i.e., "the offering of telecommunications for a fee . . . to such classes of users as to be effectively available directly to the public, regardless of the facilities used" -- was intended to include "commercial mobile service ("CMS"), competitive access service, and alternative local telecommunications services to the extent

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1 In the Joint Explanatory Statement accompanying the final version of the Act, Congress confirmed that "the term 'telecommunications service' is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services." S. Rep. No. 104-230, 104th Cong., 2d Sess. 115 (1996).

2 The legislative history of the nearly identical definition of "telecommunications service" in S.1822 in the prior Congress indicates that Congress intended to exclude "the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services." S. Rep. No. 103-367, 103d Cong., 2d Sess. 54-55 (1994). In fact, Congress expressly stated that "[t]he offering by an electric utility of bulk fiber optic capacity (i.e., 'dark fiber') does not fall within the definition of telecommunications service." *Id.*

they are offered to the public or to such classes of users as to be effectively available to the public." Joint Explanatory Statement at 114.

5. Actions Involving the ICG License Agreement

On May 10, 1996, the Texas attorney general filed a petition with the Commission seeking a declaratory ruling on the legality of various provisions of PURA95 other than Section 3.251. On May 20, ICG petitioned the Commission to issue an expedited declaratory ruling on Section 3.251 as well and to consolidate its consideration of the two petitions. On June 4, 1996, the Commission agreed to do so and issued a pleading cycle for public comments, to begin on July 3, 1996. In the meanwhile, ICG has brought a declaratory judgment action against SAPSB seeking a judicial declaration of the validity of their license agreement. In light of the attorney general's opinion, the City Council of San Antonio has also recently adopted a resolution urging SAPSB to void its licensing agreement with ICG.

ANALYSIS

Under Section 253 of the Telecommunications Act, the Commission "shall" preempt all state or local requirements that "may" prohibit, or "have the effect" of prohibiting, "any entity" from providing "telecommunications service." Section 253(b) sets forth several exceptions, but the Texas legislature did not invoke any of these exceptions in enacting Section 3.251 of PURA95, nor did the Texas attorney general do so in finding that ISG's licensing agreement contravenes Section 3.251.

In his opinion letter, the attorney general of Texas focused on whether SAPSB has gone so far beyond furnishing dark fiber that it has acquired a "degree of participation" in the provision of the telecommunications services from which it was barred by Section 3.251. For the purposes of this proceeding, ICG's petition should be granted no matter how the Commission answers that question. Indeed, the Commission need not answer it at all.

On the one hand, if SAPSB's obligations under its license agreement with ICG are viewed as no more than obligations to provide dark fiber and engage in activities reasonably necessary and incidental thereto, then SAPSB will not itself be providing "telecommunications service" within the meaning of Sections 253 and 3(51) of the federal Act. Federal preemption would still be appropriate, however, because the Act protects "any entity" from anti-competitive state and local requirements, and Section 3.251 of PURA95 would "have the effect" of prohibiting *ICG* from providing the relevant "telecommunications service." In other words, the Commission should preempt Section 3.251 because, viewing the circumstances as a whole, that provision would have the effect of prohibiting an entity from providing competitive telecommunications services in any Texas city desiring to lease surplus telecommunication facilities. Given the language and legislative history of the Sections 253 and 3(51) and the policy considerations underlying them, that is the outcome that APPA urges the Commission to adopt.

On the other hand, if the Texas attorney general is correct that the ICG agreement involves SAPSB in a "degree of participation" in offering telecommunications services to the public and thus contravenes Section 3.251 of PURA95, then, as applied *directly* to SAPSB's activities, Section 3.251 runs directly afoul of the federal Act's prohibition on state and local barriers to entry into telecommunications. That SAPSB is a municipally-owned electric utility is irrelevant. The legislative history of Section 253, without distinguishing among different kinds of utilities, explicitly mentions utilities as being among the potential beneficiaries of preemption under Section 253. Joint Explanatory Comments at 126-27. Furthermore, as the Commission has frequently observed, the entry policy reflected in the Act is "competitively neutral; it is pro-competition, not pro-competitor." *See, e.g.*, Notice of Proposed Rulemaking in Docket 96-98, 61 Fed. Reg. 18,311, 18, 315 (April 25, 1996).

CONCLUSION

As shown, Section 253 requires the Commission to preempt Section 3.251 of PURA95 because, no matter how the facts are interpreted, that provision would have the effect of prohibiting an entity, whether a municipally-owned utility or a private telecommunications provider, from providing competitive telecommunications services in Texas. APPA urges the Commission to do so expeditiously in the most clear and unequivocal terms so as to leave no doubt that the Commission will act vigorously to enforce Section 253's prohibition against state and local barriers to competition.

Respectfully submitted,

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July 3, 1996

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Petitions for Preemption of Local	)	CCBPol 96-14
Barriers Pursuant to Section 253 of	)	
the Telecommunications Act of 1996	)	

To the Commission:

REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

In these reply comments, the American Public Power Association ("APPA") responds to the three principal arguments that the State of Texas, the Texas Cable & Telecommunications Association ("TCTA") and Southwestern Bell Telephone Company have offered in opposition to the petition for preemption filed by IntelCom Group (U.S.A.) and ICG Telecom Group, Inc. (collectively "ICG"). These arguments are (1) that Section 253 of theTelecommunications Act of 1996 applies only to state and local barriers to entry by *privately*-owned providers of telecommunications services; (2) that Congress did not intend to intrude upon relationships among States, municipalities and municipally-owned utilities; and (3) that sound policy reasons support the Texas legislature's decision to bar municipalities and municipally-owned utilities in Texas from participating directly or indirectly in the provision of telecommunications services.

Before turning to these arguments, APPA pauses to underscore the main point that it made in its opening comments -- Section 253(a) protects "any entity" from state and local requirements that "may prohibit" or "have the effect of prohibiting" it from providing telecommunications services; because the ultimate, practical effect of Section 3.251(d) of the Texas Public Utility Regulation Act of 1995 ("PURA95") would be to preclude *ICG* from furnishing telecommunications services in

Texas, Section 253(d) requires the Commission to preempt it. That Section 3.251(d) may do so indirectly by denying ICG access to the telecommunications infrastructure of a municipally-owned electric utility, the San Antonio City Public Service Board ("SAPSB"), is inconsequential for the purposes of Section 253. If the Commission agrees with APPA, it can decide this matter in ICG's favor -- and thus promote competition in Texas -- without deciding or even reaching the three main arguments that the State of Texas, TCTA and Southwestern Bell have advanced.

ARGUMENT

I. SECTION 253 OF THE ACT DOES NOT APPLY ONLY TO STATE AND LOCAL BARRIERS TO ENTRY BY PRIVATELY-OWNED ENTITIES

The State of Texas, TCTA and Southwestern Bell contend that the preemption provisions in Section 253 of the Act apply only to the private sector and not to municipalities and municipally-owned electric utilities. The State of Texas articulates this argument as follows:

> ICG's reliance on § 253(a) is misplaced. The legislative history of the Act clearly indicates that the term "entity" in § 253(a) of the Act refers to a private, as opposed to a governmental, entity. The first paragraph of the Senate and House conference reports concerning the final version of the Act describes the purpose of the Act in the following terms:
>
> > . . . to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector deployment* of advanced telecommunications and information technologies and services to all telecommunications markets to competition . . .
>
> S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1966) and H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 1 (1966) (emphasis added). Because Congress intended to promote private -- not governmental competition in the Act, a municipality is not an entity covered by § 253(a) of the Act.

Comments of the State of Texas at 2-3; *see also* Comments of TCTA at 12; Southwestern Bell Comments at 12-13. This argument is incorrect for several reasons.

First, the argument is not supported by the Act itself. When Congress used the words "rapid deployment" in the preamble to the Act, it conspicuously omitted any reference to the "private sector." Rather, Congress stated that the purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Moreover, Congress's exclusion of municipally-owned utilities from the term "utility" in Section 702 of the Act also demonstrates that Congress was well aware of how to draw such a distinction when it wanted to do so. In interpreting the Act, the Commission should focus primarily on the actual language that Congress passed and that the President signed. *Medtronic, Inc. v. Lohr*, 1996 WL 345805, *8 (June 26, 1996).

Second, the committee reports go nowhere near as far as the State of Texas, TCTA and Southwestern Bell suggest. For one thing, the reports do not stop at the point that the State ends its quotation but go on to add "and for other purposes." This is significant. It is one thing to say that rapid private sector deployment is *one* of the goals of the Act and quite another to say that it is the *only* one. As Congress knows, the private sector alone cannot deploy advanced telecommunications technologies and services everywhere at the same time, much less can it do so in a way that would "secure lower prices and higher quality services" for all American consumers. Publicly-owned electric utilities emerged in hundreds of communities across the Nation for just this reason, and they have continued to thrive because they are supplying electricity at lower prices and at higher levels of quality than privately-owned electric utilities. Now, they can do the same in the field of telecommunications. By including the term "and for other purposes" in its reports, Congress indicated that private sector deployment was not the only goal of the Act. Congress was simply unwilling to stake the Nation's future in telecommunications solely on the private sector.

Third, as the Commission has repeatedly stated, the Act and its legislative history require the Commission to maintain a position of competitive neutrality. For example, in paragraph 12 of its Notice of Proposed Rulemaking on Local Competition, Docket No. 96-98, the Commission noted that:

> [The Act's] entry policy is competitively neutral; it is pro-competition, not pro-competitor. Our discussion of the 1996 Act in this and other proceedings, therefore, is phrased in terms of removing statutory and regulatory barriers and economic impediments, in permitting efficient competition to occur wherever possible, and replicating competitive outcomes where competition is infeasible or not yet in place.

Competitive neutrality is doubly important to publicly-owned electric utilities and the communities they serve. With respect to telecommunications services as such, publicly-owned electric utilities should have at least a fair and equal opportunity to provide these services or to help others to do so. Furthermore, as APPA noted in opening comments, telecommunications are becoming increasingly important to electric utilities' core business of providing efficient and reliable electric power. If the Commission expressly or effectively denied publicly-owned electric utilities an equal opportunity to upgrade and use their telecommunications infrastructure to maximum advantage, the Commission could well tip the balance in the competition that has existed between privately-owned and publicly-owned electric utilities for the last century. Given Congress's knowledge of how well this competition has served the Nation, it would be unreasonable for the Commission to assume that Congress intended, with one fleeting sentence in a massive legislative history, to hand the future of the electric power industry over to privately-owned utilities.

Fourth, the argument that the State of Texas, TCTA and Southwestern Bell are making here is premised on the notion that some sort of "firewall" must exist between the public and private sectors in deploying telecommunications services. That is a false premise. As the agreement between

ICG and SAPSB demonstrates, it is entirely possible for a publicly-owned electric utility to facilitate the rapid deployment of telecommunications services by a privately-owned entity, ICG.

For all of these reasons the Telecommunications Act poses no obstacle to the Commission's preemption of Section 3.251(d). To the contrary, the language and legislative history make clear that preemption is appropriate in this proceeding.

II. PREEMPTION WOULD NOT IMPERMISSIBLY INTRUDE UPON THE RELATIONSHIP BETWEEN THE STATE OF TEXAS AND ITS OWN MUNICIPALITIES

The State of Texas, TCTA and Southwestern Bell contend that the Act does not empower the Commission to intrude upon the relationship between the State of Texas and its own municipalities and their municipally-owned electric utilities. For example, citing *Warner Cable Com. v. Borough of Schuylkill Haven*, 784 F. Supp. 203 (E.D. Pa. 1992), TCTA argues that federal courts have previously held that the cable provisions of the Communications Act are not an affirmative source of authority with which municipalities may override the restrictions placed on them by their State legislatures and that the analysis under the 1996 Act is parallel. Comments of TCTA at 12-13. According to TCTA, the 1996 Act does not forbid municipalities from offering telecommunications services, but it "provides no positive grant of authority to municipalities to do so that would override the workings of state law to the contrary." *Id.*; *see also* Comments of Southwestern Bell at 12. TCTA has misinterpreted both the case on which it relies and the 1996 Act.

In *Borough of Schuylkill Haven,* the district court interpreted Section 533 of the Cable Act, which provided only that "a State or franchising authority may hold any ownership interest in any cable system" and went on to prohibit States and franchising authorities from exercising editorial control over the content of programming offered by the systems that they owned. The court found that "[t]he language 'may hold any ownership interest' is permissive rather than empowering -- it expresses Congress's decision that municipal ownership of cable television companies does not violate the first amendment, as long as the requirements of subsection (b) are met." 784 F. Supp. at 213. The court went on to suggest, however, that it would have reached a different conclusion had Congress clearly stated an intent to enable Schuylkill Haven Borough to operate a cable system. *Id.* The court also expressly declined to reach the plaintiff's argument that it would be unconstitutional for Congress to grant a municipality a power that the state had denied it. *Id.*

In Section 253(a) of the 1996 Act, Congress has clearly and unequivocally declared that "no" state and local statute, regulation or other requirement "may" prohibit or "have the effect of prohibiting" the ability of "any entity" to provide any interstate or intrastate telecommunications service. By using the term "shall" in Section 253(d), Congress *required* the Commission to preempt the enforcement of *all* offending state or local statutes, regulations or other requirements. The preemption provisions in Section 253 of the 1996 Act are therefore fundamentally different from the section of the Cable Act interpreted in *Borough of Schuylkill Haven*.

Furthermore, as the Commission has frequently noted, Congress intended that the Commission interpret its authority broadly and that it play a pro-active role in bringing competition to the telecommunications industry. *See. e.g.*, in paragraph 25 of its Notice of Proposed Rulemaking on Local Competition. Even if the Act and its legislative history did not conclusively establish the Commission has the power to preempt state and local barriers to entry by municipalities and municipally-owned utilities, the Commission would have ample authority to interpret the Act in this manner.

In 1932, Franklin D. Roosevelt, then a candidate for President, succinctly summarized the critical role or municipalities and municipally-owned utilities in the electric power industry:

> [W]here a community, or a city, or a county, or a district, is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government . . . to set up . . . its own governmentally owned and operated service . . . the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility a "birch rod in the cupboard, to be taken out and used only when the child gets beyond the point where more scolding does any good."

Public Papers and Addresses of Franklin D. Roosevelt at 738-39 (1938), Attachment A hereto. For more than six decades, publicly-owned electric utilities have demonstrated that these "yardstick" and "birchrod" concepts work very well in practice. APPA submits that the Commission should go to the very limits of its authority to empower publicly-owned electric utilities to play a similar role in telecommunications.

III. THE TEXAS LEGISLATURE'S POLICY REASONS FOR ENACTING SECTION 3.251 ARE IRRELEVANT, IMPERMISSIBLE AND INCORRECT

The State of Texas, TCTA and Southwestern Bell urge the Commission to uphold Section 3.251 for various policy reasons. Among other things, they suggest that mumicipalities and municipally-owned electric utilities may have conflicts of interest when acting as both competitors and regulators of privately-owned providers of telecommunications services; that they have numerous advantages that privately-owned firms cannot match; and that they should be spending their time on other more pressing governmental activities. TCTA goes so far as to cite *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 642 (11th Cir. 1990), for the proposition that "courts have previously recognized that problems can arise where municipalities undertake multiple and conflicting roles regarding private businesses with whom they compete but which remain subject to municipal regulation." Comments of TCTA at 6-7. These contentions lack merit.

First, even if the policy reasons that the State of Texas, TCTA and Southwestern Bell advance were correct, they would be irrelevant to the preemption issues before the Commission. As APPA noted in its opening comments, neither the Texas legislature nor the Texas Attorney General sought to justify Section 3.251 on any of the grounds set forth in Section 253(b), and those are the only grounds that Congress authorized the Commission to consider.

Second, even if the policy grounds advanced by the State of Texas, TCTA and Southwestern Bell could now be viewed as coming within the ambit of Section 253(b), they would not suffice to save Section 3.251(d). By singling out municipalities and municipally-owned electric utilities for special treatment, Section 3.251(d) would violate the threshold requirement of competitive neutrality set forth in Section 253(b).

Third, the concerns that the State of Texas, TCTA and Southwestern Bell have raised are entirely speculative, as were the concerns at issue in *City of Niceville*. Notably, the court held in that case, in the passage immediately following the one quoted in TCTA's comments, that:

> Currently, however, Warner has brought no matter before the City for decision, and the City is threatening no regulatory action that will result in redressable injury to Warner. In the absence of any such controversy involving actual or threatened injury to Warner, our consideration of its due process claim would be premature.

City of Niceville, 911 F.2d at 642. Similarly, if the Commission had authority to consider the policy arguments that the State of Texas, TCTA and Southwestern Bell have raised, it would be appropriate for the Commission to reject them as conjectural and premature.

Finally, the policy arguments that the State of Texas, TCTA and Southwestern Bell have raised are simply canards that have repeatedly been raised and debunked for decades in the electric power industry. *See, e.g.*, APPA, *Straight Answers to False Charges Against Public Power*, Attachment B hereto. These arguments will undoubtedly prove equally as persistent and fallacious in the telecommunications area.

CONCLUSION

For the reasons set forth in its opening comments and above, APPA submits that Section 253 requires the Commission to preempt Section 3.251(d). APPA again urges the Commission to do so expeditiously, in the most clear and unequivocal terms so as to leave no doubt that the Commission will act vigorously to enforce Section 253's prohibition against state and local barriers to competition.

Respectfully submitted,

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Attorneys for the
American Public Power Association

July 18, 1996

ATTACHMENT C

July 20, 1998

GTE Announces Strong Financial Results,

Generating Double-Digit Consolidated Revenue Growth

and 11% Core EPS Growth in Second Quarter

STAMFORD, Conn. - GTE Corp. today announced its second quarter 1998 financial results, reporting 10 percent consolidated revenue growth, and 11 percent earnings per share (EPS) growth from core operations. This is the 12th consecutive quarter of double-digit core EPS growth and the fourth consecutive quarter of double-digit consolidated revenue growth.

During the quarter, consolidated revenues and sales increased to $6.28 billion, compared to $5.69 billion in the second quarter of 1997. Earnings per share from core operations increased during the quarter to 81 cents on net income of $783 million, as compared to 73 cents per share, or $696 million, reported for the same period last year. Including the effects of the previously announced data initiatives, consolidated EPS of 70 cents remained constant compared to the second quarter of last year, when GTE's data initiatives were launched. The 11 cents per share dilutive impact of the data initiatives this quarter compares to 3 cents in the year-ago quarter.

GTE Chairman and CEO Charles R. Lee said, "Overall, we are very pleased with our second-quarter results. The key for GTE is continued profitable growth. We have embarked on an exciting strategy to accelerate our growth by investing in opportunities such as data and the creation of a new national sales, service and marketing business (CLEC). For example, we have announced one of the industry's largest deployments of high-speed ADSL Internet-access technology. ADSL operates over our existing high-quality network and enables our customers to simultaneously obtain telephone and Internet access on one line at speeds up to 25 times faster than the fastest dial-up modem. These actions, coupled with our strong core operations, enhance our competitive position."

Consolidated Results

GTE's consolidated revenues grew $585 million or 10 percent to $6.28 billion in the quarter, as compared to an increase of $399 million or 8 percent in the second quarter of 1997. Major contributors to this quarter's revenue growth include:

- Domestic access line growth of 1.6 million or 8 percent including 5 percent growth in switched lines;
- Domestic access minutes of use growth of 2.4 billion or 13 percent;

- Revenue growth of $115 million or 30 percent from enhanced services such as CentraNet®, vertical services, voice mail and CyberPOP;
- Long-distance revenue growth of $58 million or 83 percent;
- Data revenues of $191 million in the current quarter vs. $11 million in the year-ago quarter in which the data initiatives were launched;
- Additional domestic customer activity:

	Increase	Total
	over last 12 months	as of 6/30/98
Long Distance	994,000	2,244,000
Dial-up Internet access (revenue generating)	163,000	311,000
Wireless	480,000	4,631,000
Video and Other Services	106,000	142,000

- Revenue growth from consolidated international subsidiaries of 13 percent, including wireless customer growth of 26 percent.

These volume improvements, coupled with growth from integration and consulting services as well as equipment sales, more than offset the expected continuing revenue erosion in the local toll calling markets (intraLATA) due to competition and responsive price reductions GTE has implemented in those markets.

Core operating income in the second quarter was $152 million higher than the year-ago quarter. Even as GTE continued to make critical investments targeted at high-growth segments of the markets, core operating income, which excludes the data initiatives, reached $1.59 billion in the second quarter, resulting in 11 percent growth compared to $1.44 billion or a 7 percent increase in the year-ago quarter. The current quarter increase was primarily the result of core revenue growth from both domestic and international operations. Partially offsetting these increases were continuing investments, such as the cost of our new CLEC and customer-acquisition and start-up costs in the long-distance and digital PCS wireless markets. Without the costs associated with these investments, core operating income growth would have exceeded 15 percent.

Mr. Lee said, "GTE is one of the best-positioned companies in our industry today, especially as competition intensifies and customers seek bundled telecommunication products and services all on one bill. We are capitalizing on our inherent strengths, including a national footprint and one of the industry's broadest sets of service offerings. The suburban and rural composition of many of our markets continues to fuel GTE's industry-leading growth in access lines and minutes of use. These markets also attract less competition due to lower density of customers per square mile, which reduces the cream-skimming opportunities for competitors. Since the Telecommunications Act was passed in February 1996, GTE has lost only 50,000 lines to resale by other companies."

Domestic Operations

Revenues from domestic network services, including both GTE's wireline and wireless operations, increased $132 million over the year-ago quarter to $3.78 billion. Contributing to wireline growth was a 9 percent increase in business lines and a 9 percent increase in second lines. In addition to the 30 percent increase in new and enhanced services, wireline revenue from start-up investments added $83 million with the long distance business generating growth of 83 percent or an increase of $58 million and the video service offering adding $7 million over the year-ago quarter.

Domestic wireless service revenues were $671 million, an increase of $17 million or 3 percent from the year-ago quarter. The impact of the 12 percent increase in subscribers in the wireless business was partially offset by targeted responses to competitive offerings in several markets, resulting in a reduction in revenues per subscriber per month of 8 percent from the second quarter of 1997. In an effort to counteract the impact of these revenue reductions, cost reduction initiatives were implemented. These actions improved operating cash flow margins from 36 percent in the year-ago quarter to 39 percent this quarter while positioning the business to compete at lower levels of revenues per customer.

Data initiatives generated revenues of $191 million, contributing to the overall growth of GTE's domestic results. Important milestones included the number of dial-up customers, including promotional users, approaching the 600,000 mark, as well as significant expansion of GTE's new national, fiber-optic network. GTE is right on schedule with deployment of its new state-of-the-art national fiber-optic network, having activated more than 5,500 miles of fiber, over one-third of the total network.

International Growth

Consolidated international operations achieved revenue growth of $93 million or 13 percent over the year-ago quarter, contributing $793 million for the second quarter of 1998. This growth was generated by local price increases, wireless customer growth of 26 percent and access line growth of 4 percent. The international net income growth in the second quarter was $109 million, 23 percent higher than the year-ago quarter, reflecting strong volume growth including significant customer expansion in the Canadian and Latin America operations. Wireless customers from unconsolidated investments more than doubled over the last 12 months, providing a solid base for prospective results.

About GTE